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6 UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
7

8 In re:)	Case No. 12-40369 WJL (13)
)	
9 Paul Roger Mulder & Vicki Lorraine)	Date: 9-24-2015
Mulder,)	Time: 1:30 P.M.
10 Debtors.)	Room: Courtroom 220
)	Judge: Hon. William J. Lafferty
)	

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12 **Reply to Trustee's Opposition to Application for Compensation**

13 TO: Honorable William J. Lafferty, U.S. Bankruptcy Judge:
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15 **Introduction:**

16 1. On July 23, 2015, Henry G. Rendler, Esq., Attorney for Chapter 13 Debtors Paul Roger
17 Mulder & Vicki Lorraine Mulder, filed and served his Supplemental Application for Compensation
18 ("Application") [Doc 57], along with Notice of Hearing thereon [Doc 58], with the matter set for
19 hearing on August 13, 2015 @ 1:30 P.M. before U.S. Bankruptcy Judge William J. Lafferty. The
20 Application seeks supplemental attorney's fees of \$ 19,910.00 + costs of \$ 392.86 for a total of \$
21 20,302.86. The amount sought is in addition to the \$ 3600 received by Applicant as the initial fee
22 per the Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys ("R & R") filed
23 herein on January 13, 2012 [Doc 7]. Objections to the Application were due by August 6, 2015.

24 2. On July 28, 2015, Chapter 13 Trustee Martha G. Bronitsky ("Trustee") filed her Trustee's
25 Opposition to Application for Compensation ("the Opposition"), objecting to any supplemental fees
26 of more than \$ 1200.00, the maximum initial fee amount under the under the R & R for this type of
27 case. There were no other objections filed.

28 3. Applicant thereafter requested a continuance of the hearing, due to illness. This was

graciously granted by the Court, and the matter was continued to September 24, 2015, @ 1:30 P.M.

4. Applicant has met and conferred telephonically with Trustee's counsel, Leo Spanos, Esq., on two occasions, July 30, 2015, and September 21, 2015, in an attempt to possibly resolve the objection or at least narrow the issues. This Reply is filed to address the issues raised in the Objection, and to apprise the Court of the outcome of the parties' discussions.

Objection:

4. Trustee asserts four grounds in her Objection (Objection, 4:4-7:21), as follows:

(A) Application includes Fees for Services That Are Covered in the Rights and Responsibilities;

(B) Plan Must Pay 100 Percent to Unsecured Creditors Pursuant to 11 U.S.C. Section 1325(a)(4);

(C) Plan Will Be Unfeasible; and

(D) Application Includes Fees for Services That Have Not Benefitted the Debtors or the Estate.

Points Believed Resolved:

5. As to the above objections, it is believed that the parties have resolved Items (B and (C)). These two points are not objections to the application, per se, but rather procedural points which will need to be addressed in the event that supplemental fees are awarded. As to (B), the parties are in accord that Debtors' confirmed 3d Amended Chapter 13 Plan, filed on May 17, 2012 [Doc 43], and confirmed by Judge Lafferty's Confirmation Order After Court Hearing entered on May 30, 2012 [Doc 50], which now provides for payment of 100% on all claims, plus interest at the legal rate of 0.12% per annum (see Plan, Para. 2(d)), will remain unchanged as to the dividend amount and the interest thereon. As to (D), the parties agree that, should supplemental fees be awarded, a motion to modify plan will need to be filed and served, to provide for treatment thereof. The points remaining at issue, therefore, are believed to be (A) and (D), which will be addressed below.

Discussion and Background of the Rights and Responsibilities:

6. The last paragraph of the R & R provide: "...if the initial fees ordered by the Court are not sufficient to compensate the attorney for legal services rendered in this case, the attorney further

1 agrees to apply to the court for additional fees....” (See R & R, page 2, bottom). It is believed that
2 the initial fees in this case are not sufficient to compensate Applicant for the services which were
3 required, and that is why Applicant filed the Application.

4 7. Applicant has been practicing primarily bankruptcy and reorganization law since 1981.
5 Most of this work has been in representing individual and small corporations in Chapter 11 cases,
6 individuals in Chapter 13 cases, and a sprinkling of Chapter 7 cases. From 1978-1981, Applicant was
7 involved in a few cases which had been filed pre-Bankruptcy Code, under Chapter XI and XII.
8 Applicant has also represented creditors over the years, although this is a small portion of his
9 practice.

10 8. For the past 24 years, Applicant has used the Interbill (formerly Pro Data) billing system
11 for all of his clients. Applicant’s time records are maintained on a contemporaneous basis. Each and
12 every month, Debtors were sent a statement showing all services and costs for the prior month,
13 marked: “for information only, do not pay—all payments are made by the Chapter 13 Trustee”.
14 Applicant has filed scores of fee applications in Chapter 11 cases, which require sorting by project.
15 Applicant has not done so in this Chapter 13 matter, in an attempt to keep costs down. However,
16 Applicant is certainly amenable to doing such a “project” by “project” analysis in this case, should
17 the Court believe it would help.

18 **Point B—The Services Provided, and the Rights and Responsibilities:**

19 9. Applicant expended at least 16.5 hours @ \$ 350/hour = 5,775, in dealing pre-confirmation
20 with the First Horizon/BNY/Nationstar first trust deed. As noted in the Application, Debtors’ home
21 was set for a non-judicial foreclosure sale. Debtors had spent 10+ months in Alameda County
22 Superior Court after suing the lender to enjoin the foreclosure sale. They obtained a preliminary
23 injunction against the sale. About 10 months later, they lost the request for permanent injunction.
24 During these 10 months, Debtors paid \$ 2500 per month to the lender, by cashier’s checks to the
25 lender’s lawyer’s trust account. At the time the Chapter 13 petition was filed, these funds remained
26 in the possession of lender’s attorneys, McCarthy & Holthus.

27 10. Debtors’ original Chapter 13 Plan filed on January 17, 2012 [Doc 11] provided for
28 payment of the lender’s arrears through the plan, and set the arrears at \$ 26,935.17, consisting solely

1 of missed installment payments, with Debtors advising Applicant that Debtors had themselves paid
2 the property taxes. On March 5, 2012, the lender filed an objection to confirmation of the plan,
3 alleging, *inter alia*, that the arrears were actually \$ 68,945.47. This amount included claimed arrears,
4 plus about \$ 18k of claimed escrow advances for payment of property taxes. The \$ 68k amount did
5 not reflect as a credit the \$ 25k being held by lender's lawyer. This was also set forth in lender's
6 Proof of Claim # 3 filed on February 26, 2012.

7 11. Based on Debtors' information, on April 23, 2012, Applicant filed an Objection to Claim
8 # 3, alleging that the true claim was \$ 26,935.17, that the claim was over-stated by failure to credit
9 the \$ 25k held by lender's lawyer, and that there was no escrow shortage as Debtors themselves had
10 paid the property taxes. Applicant spent numerous hours in litigating these issues. As it turned out,
11 the Debtors' information was partially correct. They had paid the lender the \$ 25k; they had not paid
12 the taxes, however. The true claim ended up being in the middle, namely, \$ 43,945.47. This amount
13 was then set forth in the Debtors' 3d Amended Plan, and ended up being confirmed.

14 12. The R & R set forth duties for both the clients and their counsel. The debtors are required
15 to "provide the attorney with accurate financial information." (R & R, paragraph 1). This was not
16 done here. Had it been done, and Applicant had the proper information, Applicant would have
17 objected to the lender's claim solely on the basis that it failed to credit Debtors with the \$ 25k being
18 held by lender's counsel. Frankly, had Applicant been furnished with the proper info, it may have
19 been possible to secure an award of attorney's fees against the lender. However, as it turned out, both
20 the lender's info and the Debtor's info were inaccurate. The R & R initial fees are based on having
21 the accurate info. Applicant should not be penalized when he is forced to do additional work under
22 these circumstances.

23 13. This point also comes into play concerning the additional work performed. Based on the
24 lender's inaccurate claim, and the Debtors' misinformation re the escrow shortage/property tax issue,
25 Debtors' plan could not be confirmed and confirmation was continued. On May 21, 2012, the
26 Trustee filed her Motion to Dismiss the case, for alleged undue delay being prejudicial to creditors.
27 Applicant almost immediately, 3 days later, on May 24, 2012, filed a detailed opposition [Doc 47]
28 to this motion, along with an objection to evidence. Confirmation of the amended plan could not

1 occur until the lender filed its amended claim, with the credit for the \$ 25k payment. The lender
2 delayed in doing this. Ultimately, within the next week, Applicant pushed the matter through by
3 obtaining a stipulation from the lender re plan treatment, and the plan was confirmed shortly
4 thereafter. The odd thing about the motion to dismiss, was that the primary creditor being paid under
5 the plan, the lender's \$ 43k arrears, was the same entity holding up confirmation by not amending
6 its inaccurate claim. Again, Applicant would not have been required to perform these additional
7 services, it is believed, had he been provided with the proper information from the Debtors. And, if
8 he had that proper information, it would have made it much more feasible for Applicant to attempt
9 to recover the fees against the lender. Applicant expended about 2.9 hours in responding to the
10 motion and obtaining withdrawal thereof 9 days after it was filed.

11 14. Under the R & R, the maximum initial fee is \$ 4800 for a non-business case, and \$ 6,000
12 for a business case. Debtor Paul Mulder is the principal of a family-owned business, and not a sole
13 proprietor. Thus, under the R & R, the maximum initial fee is \$ 4800. However, for some reason,
14 the Trustee's office attempted to treat it as a business case, and sent out a notice of business
15 evaluation. Applicant was forced to expend 4.0 hours @ \$ 350/hour = \$ 1,400, between February
16 2 and February 10, 2012, via a brief and declarations of the Debtor, in convincing the office that this
17 was incorrect. Ultimately, the Trustee's office withdrew the notice.

18 **Point D—The Services Provided were for the Benefit of the Debtors:**

19 15. Despite having substantial equity in their home, Debtors found themselves unable to get
20 relief under any loan modification programs. They asked Applicant for assistance in trying to
21 refinance their home. Per this request, Applicant spent numerous hours, all clearly delineated in the
22 time sheets attached to the Application, in helping Debtors with this process. Applicant contacted
23 Robert Schuman of Network Financial Group in Morgan Hill. Mr. Schuman specializes in obtaining
24 loans for people in bankruptcy cases and those who have recently exited bankruptcy, and has 20+
25 years of experience. Applicant has often referred clients to Mr. Schuman for assistance on other
26 cases over the years. On the basic attempted refinance and loan modification work, Applicant
27 expended about 4.5 hours @ \$ 350/hour = \$ 1,575.

28 16. During this process, a number of issues arose. First of all, the lender refused to provide

1 Debtors with a mortgage interest statement showing the \$ 25k paid in 2012, which delayed Debtors'
2 filing of their tax returns. Applicant expended about 1.8 hours @ \$ 350/hour = \$ 630 regarding this
3 issue. Also, Mr. Schuman pulled a credit report, which showed a completed foreclosure sale. This
4 derogatory, and incorrect, credit entry made getting a loan much tougher. Applicant spent at least
5 10.8 hours @ \$ 350/hour = \$ 3,780, in dealing with the Debtors, Mr. Schuman, the lender's agents
6 and attorneys, in trying to resolve the issue, ultimately to no avail.

7 17. At that point, Applicant contacted Ben Dupre, Esq., explained the situation, and referred
8 Debtors to Mr. Dupre. Mr. Dupre has practiced bankruptcy law, and lately has been specializing in
9 credit issues like this. As it turned out, there was ultimately no resolution or change made. Applicant
10 spoke to Mr. Dupre last month, and was advised that any services he performed were done as a
11 courtesy, and there was no charge for his work. As of this date, Debtors have not refinanced their
12 home, continue their payments to the Trustee to cure the \$43k of pre-petition arrears, and are on
13 target to complete their plan in approximately January, 2017.

14 18. Applicant performed the above work. It is not a portion of the R & R services. The
15 services were performed at the request of, and for the benefit of, the Debtors. Applicant is unaware
16 of any requirement that the services become non-compensable solely because the attempt at the
17 refinance was not successful, as argued by the Trustee. As one commentator puts it:

18 “....Section 330 (of the Bankruptcy Code) does not require that the services result in a
19 material benefit to the estate. It need only be shown that the services were reasonably likely to
20 benefit the estate at the time the services were rendered. {*In re Mednet*, 9th Cir. BAP 2000), 251 BR
21 103, 108; *In re Auto Parts Club, Inc.*, 9th Cir. BAP 1997, 211 BR 29, 33}. (2014 Cal. Practice Guide,
22 Bankruptcy, The Rutter Group, p. 4-78, Para. 4:1110). The services performed by Applicant were
23 reasonably likely to benefit the estate at the time they were rendered and are thus compensable. This
24 is determined objectively, with reference to the time the services were rendered, and not based on
25 pure hindsight. (11 U.S.C. Section 330(a)(3)(A), (C); *In re Circle K Corp.*, BC D AZ 2003, 294 BR
26 111, 125). Applicant is aware of Trustee's concerns. The R & R serve a laudable purpose of
27 encouraging efficiency in Chapter 13 practices. However, attorneys who perform extra services for
28 their clients should also be justly compensated. This is the case under even the so-called “no look”

1 fees. The R & R itself spells out a base or “initial” fee. This obviously contemplates that the Court
2 has the authority and discretion to review cases to see if additional fees are warranted. Applicant
3 believes that this is a proper case for such an award. Applicant is prepared to address any issues or
4 questions which the Court may have regarding this Application. (See, e.g., *In re Eliapo*, 9th Cir.
5 2006, 468 F. 3d 592, 599-600.)

6 **Proposed Resolution:**

7 19. After meeting and conferring with the Trustee’s lawyer, and in again reviewing the time
8 sheets, Applicant has a proposed resolution of the matter. This would consist of a reduction of the
9 request down to 33.6 hours @ \$ 350 per hour - \$ **11,760**. This is broken down as follows:

10 Pre-confirmation hours of 16.5 @ \$ 350/hour = \$ 5,775 in dealing with the First
11 Horizon/BNY/Nationstar claim/objection issue; and

12 Post-confirmation hours of 17.1 @ \$ 350/hour = \$ 5,985, including:

13 1.8 hours @ \$ 350/hour = \$ 630 re the lender’s incorrect 1098 mortgage interest form;

14 4.5 hours @ \$ 350/hour = \$ 1,575 re the loan modification and attempted refinance; and

15 10.8 hours @ \$ 350/hour = 3,780 re the credit report issue.

16 **Notice of Correction in Time-Sheet Entries:**

17 20. Applicant notes that, after further review, there are two erroneous time entries on 5-8-
18 2012, items 117 and 118, amounting to 0.7 hours @ \$ 350/hour = \$ 245. These entries have been
19 deleted and the correction will appear on the Debtors’ next billing statement.

20 **Conclusion:**

21 21. Applicant believes that an award of additional fees of \$ 11,760 based on 33.6 hours of
22 time @ \$ 350/hour is fair and reasonable compensation, and Applicant hereby reduces the
23 Application to said amount. Applicant requests that the Court enter its order approving said fees as
24 an administrative expense herein, and for such and other further relief as is just.

25 Respectfully submitted,

26 Dated: 9-22-2015

/s/ Henry G. Rendler
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CA State Bar # 83704
Attorney for Debtors